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ASSESSING MODERN BANKRUPTCY LAW: AN EXAMPLE OF JUSTICE*

Veryl Victoria Miles**

> Earthly power doth then show likest God's when mercy seasons justice.[1]

I. INTRODUCTION

One might measure the success of a law *only* by how well the law achieves the objectives of its creators. Of course, this approach will be guided solely by the vision and values of the creators, which may not necessarily include greater values of justice, mercy, and charity. Accordingly, a more meaningful, challenging, and enlightened measurement of the success of a law would be to assess how effectively it serves the notions of social justice.

Social justice, as we learn from the writings of Aristotle in the *Nicomachean Ethics*, is "the summary of all Virtue"[2] — complete and supreme. We achieve this justice by the way we respond to the concerns of others through our laws; that is, the concerns and needs of the community to which we belong.[3] The actions and conduct of men and women in relation to one another and the laws that are created to regulate the

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* The title is derived from a section in John Finnis' book *Natural Law and Natural Rights*, titled "An Example of Justice: Bankruptcy." JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS 188-97 (1980).

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1. WILLIAM SHAKESPEARE, THE MERCHANT OF VENICE act 4, sc. 1.

2. ARISTOTLE, THE NICOMACHEAN ETHICS OF ARISTOTLE 137-38 (J.E.C. Welldon, D.D. trans., MacMillan 1934) (1892) (footnotes omitted).

3. *Id.* In the words of Aristotle:

> Justice . . . is complete virtue although not complete in an absolute sense, but in relation to one's neighbours. Hence it is that justice is often regarded as the supreme virtue, "more glorious than the star of

conduct of the members of a community can be defined as "just" or "unjust." Whether a law is "just" or "unjust" is based on how laws serve the common good of the greater community that is affected by such laws.[4] Aristotle identified this notion of justice as general justice.

In addition to this definition of "general justice," Aristotle identified another concept of justice that he called "particular justice."[5] Particular justice is a concept that is quantitative in nature and is premised upon concepts of equity and fairness.[6] The equity and fairness that embodies Aristotle's particular justice is defined as "distributive justice" and "corrective justice."[7] Distributive justice anticipates each person receiving their due share or proportionate share of the whole, as determined by one's contribution to the whole or what one is entitled to receive from the whole by right.[8] Whereas cor-

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eve or dawn;" or as the proverb runs "Justice is the summary of all Virtue."

It is in the highest sense complete virtue, as being an exercise of complete virtue. It is complete too, because he who possesses it can employ his virtue in relation to his neighbours and not merely by himself; for there are many people who are capable of exhibiting virtue at home, but incapable of exhibiting it in relation to their neighbours. Accordingly there seems to be good sense in the saying of Bias that "office will reveal a man," for one who is in office is at once brought into relation and association with others. It is this same reason which makes justice alone of the virtues seem to be the good of others, as it implies a relation to others, for it promotes the interests of somebody else, whether he be a ruler or a simple fellow-citizen.

Id.

4. Aristotle defined justice and just laws as laws that:
pronounce upon all subjects with a view to the interest of the community as a whole, or of those who are its best or leading citizens whether in virtue or in any similar sense. Thus one sense in which we use the term "just" for all that tends to create and to conserve happiness and the elements of happiness in the body politic.

Id. at 137.

5. *Id.* at 140-42.

6. *Id.* at 142-55.

7. *Id.*

8. *Id.* at 143. Aristotle explained the concept of distributive justice as:
that which is just is a mean, that it is fair or equal and that it is relative to certain persons. It follows also that, inasmuch as it is a mean, it is a mean between certain extremes, viz. excess and defect, and that inasmuch as it is just, it is relative to certain persons. . . . For if the persons are not equal, they will not have equal shares; in fact the source of battles and complaints is either that people who are equal have unequal shares, or that people who are not equal have equal shares, distributed to them. The same truth is clearly seen from the principle of merit; for everybody admits that justice in distributions is

rective or commutative justice is purely concerned with equality from a geometric perspective — each person should be treated as equal under the law.[9] Although distributive and commutative justice call for quantitative measurements for achieving justice, these concepts of particular justice must always reflect the "complete virtue" of general justice and be applied in a manner that reflects concern for the common good of society.[10]

In his book *Natural Law and Natural Rights*,[11] Professor John Finnis identified modern bankruptcy law as "an example of justice" on the theory that the principles and rules that underlie modern bankruptcy law embody the Aristotelian concepts of distributive and commutative justice.[12] Professor Finnis' illustration of how modern bankruptcy law reflects distributive and commutative justice is compelling. Indeed, it is this comparative assessment of modern bankruptcy law as an example of justice that causes one to wonder how well our bankruptcy law stands against other more developed notions of justice.

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determined by merit of some sort; only people do not all understand the same thing by merit.

Id.

9. *Id.* at 147. Aristotle explained corrective justice as "the mean between profit and loss." *Id.* He further explained:

> It is when the whole is equally divided into two segments that people are said to have what belongs to them, as having received an equal amount. This equal amount is an arithmetical mean between the greater and the smaller lines. This is in fact the reason why it is called "just", because the division is just and equal one.

Id. at 147-48.

10. Aristotle explained the application of distributive justice:

> It is justice which entitles the just man to be regarded as capable of deliberately effecting what is just, and of making a distribution whether between himself and somebody else, or between two other people, not in such a way as to give himself too large, and his neighbor too small a share of what is desirable, and conversely to give himself too small and his neighbour too large a share of what is injurious, but to give both himself and his neighbour such a share as is proportionately equal, and to do the same when the distribution is between other people.

Id. at 155-56.

11. JOHN FINNIS, NATURAL LAW AND NATURAL RIGHTS (1980).

12. *Id.* at 188-93. Professor Finnis introduced his illustration of how modern bankruptcy law reflects Aristotelian notions of justice with a comprehensive description and explanation of Aristotle's definition of general and particular justice as well as the definitions of justice by other philosophers including Saint Thomas Aquinas. *Id.* at 161-88.

The task undertaken in this article will be to consider how well modern bankruptcy law measures up to concepts of justice that have evolved from Catholic social thought. The application of Catholic social justice in the assessment of whether a law is "just" or "unjust" can be viewed as a rational progression in evaluating the quality of justice achieved under a law.

The teachings of social justice espoused by the Catholic Church are heavily influenced by the writings of Saint Thomas Aquinas,[13] which, in turn, were derived from Aristotle's work on justice and seasoned with moral virtues of mercy and charity. By introducing Catholic social justice as a barometer for measuring the extent and quality of justice provided under a secular law such as bankruptcy, one is challenged to consider the extent to which a society benefits from the influences of nonsecular values and ethics in the legislative evolution of all of its secular laws. Because the nonsecular values and ethics that are the subject of this article are derived from modern Catholic social thought, this article will discuss briefly the concept of justice fashioned by Saint Thomas' *Summa Theologica*[14] and selected teachings from the Catholic Church on social justice expressed in several of the papal encyclicals beginning with Pope Leo XIII's *Rerum Novarum*.[15]

Next, this article discusses Professor Finnis' analysis of how modern bankruptcy law satisfies the Aristotelian concepts of justice, and assesses the extent to which modern bankruptcy law reflects the values articulated under the theory of social justice that has evolved from modern Catholic social teachings. As noted above, a correlative objective of this article is to stimulate an appreciation of the value of measuring the justice achieved under secular laws against nonsecular concepts of justice. This article concludes that such morally inspired standards of justice demand a higher level of justice from the laws enacted to govern and provide for the common good of our communities.

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13. *See* ST. THOMAS AQUINAS, SUMMA THEOLOGICA, II-II, *in* THE POLITICAL IDEAS OF ST. THOMAS AQUINAS 105, question 58 (Dino Bigongiari ed., 1953).

14. *Id.*

15. POPE LEO XIII, RERUM NOVARUM (1891), *reprinted in* CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE 14 (David J. O'Brien & Thomas A. Shannon eds., 1992).

II. JUSTICE AND THE TRADITION OF CATHOLIC SOCIAL THOUGHT

The teachings of Saint Thomas Aquinas provide a framework of concepts that guide Catholic social thought, and are, therefore, indispensable to one's appreciation of Catholic social justice. In his discussion of justice in *Summa Theologica*,[16] Saint Thomas defended and supported Aristotle's concept of general justice as being "complete virtue," whereby one acts for the common good of others. According to Saint Thomas:

> Justice . . . directs man in his relations with other men. . . . It follows, therefore, that the good of any virtue, whether such virtue directs man in relation to himself or in relation to certain other individual persons, is referable to the common good to which justice directs; so that all acts of virtue can pertain to justice, in so far as it directs man to the common good. It is in this sense that justice is called a general virtue. And since it belongs to the law to direct to the common good, . . . it follows that the justice which is in this way styled general, is called "legal justice," because thereby man is in harmony with the law which directs the acts of all the virtues to the common good.[17]

Although Saint Thomas followed Aristotle's concept of general justice, he suggested that other moral virtues such as mercy and charity further define the meaning of justice. He explained that these virtues are secondary to justice because of their connection to justice. That is, "to succor the needy, which belongs to mercy or pity, and to be liberally beneficent, which pertains to liberality, are by a kind of reduction ascribed to justice as to their principal virtue."[18] Accordingly, those who are blessed with abundance have that which they need and what is due them, but should be moved to share their abundance with the needy for the common good of society. From Saint Thomas' theory of justice as a "complete virtue," which is directed to achieve a common good for all, and seasoned by higher virtues of mercy and charity, we find the formative and guiding influences of social justice as evolved from Catholic social thought.

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16. AQUINAS, *supra* note 13, at 105.
17. *Id.* at 113-14.
18. *Id.* at 124.

The encyclicals issued by Catholic Church leaders during the last century have consistently reflected a concept of social justice that is infused with the virtues of mercy and charity as proper responses to the unjust treatment and sufferings of mankind throughout society. These same statements from the church on social justice have been criticized by some as being "too idealistic" and by others as failing "to preserve [the church's] prophetic integrity."[19] To the contrary, the church's willingness to apply these ideals to real social controversy has made Catholic social teaching a credible witness. As stated in one commentary:

> [I]t is precisely the effort to be *both* prophetic and responsible that distinguishes Catholic social teaching and makes it so significant in the modern world. The church as a whole is trying to be both idealistic and realistic because that is what it is called to be, and it is what all persons must try to be if humanity is to overcome its apparently insurmountable problems. To put it most simply, if men and women do not believe that it is possible to live in justice and peace, they will slip ever deeper into a fatalism that only confirms the drift of events toward greater tragedy.[20]

Pope Leo XIII's *Rerum Novarum* is regarded as the primal writing on modern Catholic social thought, the encyclical that all subsequent pontiffs have followed and celebrated as the foundation of Catholic social doctrine. Although it was written in 1891, against the backdrop of the European Industrial Revolution, its message remains timeless.[21]

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19. CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE 5 (David J. O'Brien & Thomas A. Shannon eds., 1992).

20. *Id.*

21. See Pope Pius XI's *Quadragesimo Anno* for a discussion of the impact of the *Rerum Novarum* on society. POPE PIUS XI, QUADRAGESIMO ANNO (1931), *reprinted in* CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE 42 (David J. O'Brien & Thomas A. Shannon eds., 1992). Pope Pius described the long term effect that Pope Leo's *Rerum Novarum* had on law and society:

> As a result of these steady and tireless efforts, there has arisen a new branch of jurisprudence unknown to earlier times, whose aim is the energetic defense of those sacred rights of the workingman which proceed from his dignity as a man and as a Christian. These laws concern the soul, the health, the strength, the housing workshops, wages, dangerous employments, in a word all that concerns the wage earners, with particular regard to women and children. Even though these regulations do not agree always and in every detail with the recommendations of Pope Leo, it is none the less certain that much which they contain is strongly suggestive of *Rerum Novarum*, to which in large

On the fortieth anniversary of the *Rerum Novarum*, Pope Pius XI credited Pope Leo's teachings as being a catalyst for many of the laws that reformed the deplorable social conditions of the Industrial Revolution, for transcending non-Catholic communities, and for hitting a cord with "legislative assemblies and in courts of justice."[22] According to Pope Pius, the *Rerum Novarum* "prevailed" on its readers to affect social policy and to give assistance to legislators so that they might affect legislative bodies as "advocates of the new [social] policy" in reflecting the teachings of Pope Leo.[23]

When Pope John Paul celebrated the centennial anniversary of the *Rerum Novarum* in 1991, he provided a striking reminder of the historical backdrop against which the *Rerum Novarum* was written and to which its message responded. In his letter, *Centesimus Annus*,[24] Pope John Paul noted that the late 1800s were a historical challenge for all, including the church, as it observed an Industrial Revolution that brought with it radical improvements and efficiencies in science and technology.[25] These advances brought forth a newer, more progressive and prosperous mercantilism and consumerism, which affected not only the world economy, but also its politics.[26] Although these changes brought "hope of new freedoms" to society, they also brought "the threat of new forms of injustice and servitude."[27] Because of the new advancements in science and technology, the manufacturing processes became more efficient and less dependent on labor. Accordingly, the cost of labor was reduced, resulting in a reduction in the bargaining power of labor in the market place, and making wages insufficient to support the average worker.[28]

> measure must be attributed the improved condition of the workingmen.

Id. at 47-48, para. 28.

22. *Id.* at 46, para. 21.

23. *Id.* at 47, para. 27.

24. POPE JOHN PAUL II, CENTESIMUS ANNUS (1991), *reprinted in* CATHOLIC SOCIAL THOUGHT: THE DOCUMENTARY HERITAGE 439 (David J. O'Brien & Thomas A. Shannon eds., 1992).

25. *Id.* at 441-47.

26. *Id.* at 441-42.

27. *Id.*

28. *Id.* at 441-42. In his account of the impact that the Industrial Revolution had on society and the significance of the *Rerum Novarum* at that time, Pope John Paul stated:

In *Rerum Novarum*, Pope Leo addressed the prevailing poverty found throughout Europe and the deplorable labor conditions of the working class. Pope Leo defined the role of the church in responding to the social crises of the time: to instill virtues in men and women that would enable them to combat the effects of both earthly and spiritual poverty. He stated that if virtues of morality are "adequately and completely practiced" they can satisfy both "spiritual" and "earthly" needs.[29] In the words of Pope Leo, the practice of such values

> powerfully restrains the lust of possession and the lust of pleasure — twin plagues, which too often make a man without self-restraint miserable in the midst of abundance; it makes men supply by economy for the want of means, teaching them to be content with frugal living and keeping them out of the reach of those vices which eat up not merely small incomes, but large fortunes, and dissipate many a goodly inheritance.[30]

It is perhaps with these words that one might characterize Pope Leo's comments on the mission of the church to arm humanity with values to fight the temptations of the temporal world — temptations that might lead to spiritual and financial bankruptcy — as being simple and hopelessly idealistic. The church's concern with the moral health of men and women as a part of the solution to poverty, however, made perfect sense when tempered with Pope Leo's views on the role of the state and what society can reasonably expect from the state in the elimination of poverty.

> The result of this transformation was a society "divided into two classes, separated by a deep chasm." This situation was linked to the marked change taking place in the political order . . . . Thus the prevailing political theory of the time sought to promote total economic freedom by appropriate laws, or, conversely, by a deliberate lack of any intervention. At the same time, another conception of property and economic life was beginning to appear in an organized and often violent form, one which implied a new political and social structure.
>
> At the height of this clash, when people finally began to realize fully the very grave injustice of social realities in many places and the danger of a revolution fanned by ideals which were then called "socialist," Pope Leo XIII intervened with a document which dealt in a systematic way with the "condition of the workers."

Id. (footnote omitted).

29. POPE LEO XIII, *supra* note 15, at 25, para. 23.

30. *Id.*

According to Pope Leo, justice is not a static concern with formal rights and duties. It is a dynamic challenge for the state to create a just, fair, and responsible society, through the creation and implementation of institutions and laws that produce both "public well-being and private prosperity."[31] This task can be described in terms of the concepts of justice and the common good, as framed by Saint Thomas. In using these concepts, Pope Leo suggested that the laws must balance the interests and entitlements of the individual members of society against the well-being of the society as a whole, with an expectation of contribution from the fortunate to the less fortunate.[32]

By following the lead of Saint Thomas in his belief that moral virtues play a critical role in the attainment of social justice, Pope Leo developed further insight that distributive justice within a society depends not only on the state but also on individual efforts. That is, the secondary virtues of "mercy, liberality, and the like" will guide men and women of the community to make decisions about their economic and social welfare that will be in their individual best interest, but will also benefit the common good of the community in which they live.[33] These same just men and women will influence the shape of the laws of the state in a just way, either directly as law makers or indirectly through the election of those who will represent them.

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31. *Id.* at 26, para. 26.

32. *Id.* at 26-27. Pope Leo stated:

> To the State the interest of all are equal whether high or low. The poor are members of the national community equally with the rich; they are real component parts, living parts, which make up, through the family, the living body; and it need hardly be said that they are by far the majority. It would be irrational to neglect one portion of the citizens and to favor another; and therefore the public administration must duly and solicitously provide for the welfare and comfort of the working people, or else that law of justice will be violated which ordains that each shall have his due.

Id.

33. Pope Pius offered his own perspectives on the role and interest of the church in both the economic and social welfare of society. He stated that the church's concern in such matters is appropriate to its "God-given task" because of the impact that such conditions have on the "moral conduct" of its citizens. POPE PIUS XI, *supra* note 21, at 51, para. 41. He noted that "economic activity and moral discipline" are interrelated by virtue of the fact that the material requirements that men and women deem necessary and desirable are affected and defined by their sense of "reason," which should reflect good and sound judgment and thus, the moral fitness of each individual. *Id.* at para. 42.

In the Catholic tradition, just laws should reflect fairness and responsibility to all by providing for the enforcement of the obligation of commutative justice between individuals. Such laws, however, must also balance the public well-being against private prosperity and reflect the common good of all through a dynamic regard for the requirement of distributive justice. If it is necessary for the common good of all to require contribution and sacrifice from the more fortunate to the less fortunate, then the laws must so provide. The law's regard for distributive justice must include all members of society and not be unduly preferential to one group at the expense of another.[34]

Just as the papal social teachings strike a balance between idealism and realism, they also balance state action in the pursuit of social justice with a healthy regard for the important role of "the individual, the family and society" as being primarily responsible for achieving justice.[35] Accordingly, as one looks to the concepts of social justice that have evolved from the Catholic Church, it is imperative to consider not only the role of the state in achieving justice, but also the role of the individual in solving social problems with justice.

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34. In the words of Pope Pius:

> Wealth, . . . which is constantly being augmented by social and economic progress, must be so distributed among the various individuals and classes of society that the common good of all, of which Leo XIII spoke, be thereby promoted. In other words, the good of the whole community must be safeguarded. By these principles of social justice one class is forbidden to exclude the other from a share in the profits.
>
> Each class, then, must receive its due share, and the distribution of created goods must be brought into conformity with the demands of the common good and social justice.

Id. at 55-56, paras. 57, 58.

Pope John Paul also noted the enduring quality of Pope Leo's message regarding the "relationship between the state and its citizens." POPE JOHN PAUL II, *supra* note 24, at 446. He recalled Pope Leo's admonition that a state must not favor one group of citizens over another. *Id.* And while the words of Pope Leo were written with the laborer in mind, they carried a truth for all kinds of interests in relation to the state's duties to its citizens. According to Pope John Paul, this included "namely the rich and prosperous, nor can it 'neglect the other,' which clearly represents the majority of society." *Id.*

35. POPE JOHN PAUL II, *supra* note 24, at 447.

III. COMPARATIVE ANALYSIS: BANKRUPTCY LAW AND JUSTICE

A. *Evolving Justice Under Bankruptcy Law*

Bankruptcy law is devoted to the plight of debtors who find themselves overwhelmed by financial burdens and unable to meet their debt obligations. These obligations may have been incurred by the debtor voluntarily, or they may have been imposed on the debtor by law due to their legal status, such as a delinquent taxpayer owing unpaid income taxes to a local, state, or federal tax authority, or a noncustodial parent required by court decree to pay child support. In any case, these debtors look to our bankruptcy law as a source of relief from their debt obligations and the resulting pressures their creditors force upon them in hopes of receiving some payment on long overdue debts.

Our current bankruptcy law, formally known as the Bankruptcy Reform Act of 1978[36] and more commonly referred to as the Bankruptcy Code, is a law of equity. As a law premised on equity and focused on balancing the interests of all affected parties, its purpose is not only to provide relief to the distressed debtor, but also to achieve a fair and just settlement of the various creditors' claims in any property of the debtor that is available to satisfy these claims.[37] The relief

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36. Pub. L. No. 95-598, 92 Stat. 2549 (1978) (codified as amended at 11 U.S.C. §§ 1-151326 (1988 & Supp. V 1993)).

37. This notion of equity in modern bankruptcy law was observed by Charles Warren in his book *Bankruptcy in United States History*. In his discussion of the legislative history leading up to the enactment of the Bankruptcy Act of 1898, the predecessor to the Bankruptcy Code, he stated that congressional power in providing for bankruptcy laws:

> should not [be exercised] in the interest either of the debtor or of the creditor class alone — and that, in fact, there could be no such division of American citizens, since most of us are in one capacity debtors, and in another capacity creditors. There is now, therefore, a rather general acceptance of the principle that a bankruptcy law is required in the public interest of the Nation at large and for its welfare, apart from the effect of the law upon the particular individuals on whom it is to operate. Now, the chief interest of the Nation lies in the continuance of a man's business and the conservation of his property for the benefit of creditors and himself, and not in the sale and distribution of his assets among his creditors, or even in his own immediate discharge from his debts.

CHARLES WARREN, BANKRUPTCY IN UNITED STATES HISTORY 144 (1935).

Similarly, Congress emphasized equity and balance in the legislative history of the Bankruptcy Reform Act of 1978:

sought by the individual debtor is a discharge of all debts existing at the time he or she files a petition in bankruptcy.[38] The creditors from whose debts the debtor will be discharged hope to receive some equitable share of the proceeds resulting from the sale of the debtor's pre-bankruptcy assets, or the bankruptcy estate.[39] This, in essence, is the justice of modern bankruptcy law. It is a law responding to the plea for relief of the bankrupt debtor, while resolving to treat all creditors fairly and equitably according to their claims of financial contribution from a once financially viable debtor.[40]

> The overall objectives of [the Reform Act legislation] are to make bankruptcy procedures more efficient, to balance more equitably the interests of different creditors, to give greater recognition to the interests of general unsecured creditors who enjoy no priority in the distribution of the assets of the debtor's estate, and to give the debtor a less encumbered "fresh start" after bankruptcy.

S. REP. NO. 1106, 95th Cong., 2d Sess. 1 (1978), *reprinted in* COLLIER ON BANKRUPTCY app. 3 (Lawrence P. King ed., 15th ed. 1994).

38. This discussion of relief provided under modern bankruptcy law will be limited to the kind of relief an individual debtor may receive in a chapter 7 liquidation. Section 726 of the Code provides that upon the liquidation of all nonexempt assets of the bankruptcy estate and distribution of proceeds to the debtor's creditors, individual debtors will receive a discharge from all pre-petition indebtedness, except for debts that are deemed nondischargeable under section 523 of the Code. 11 U.S.C. §§ 523, 726 (1988 & Supp. V 1993).

Individual debtors who have regular income may elect to seek relief under chapter 13 of the Code as opposed to relief under chapter 7. Under chapter 13, a debtor is not required to submit his or her pre-petition assets for liquidation in order to receive a discharge. In chapter 13 cases, a debtor is required to propose a plan to pay creditors certain prescribed minimum amounts on their claims against the debtor over a three to five year period from their future income or earnings. Because the payments to creditors are being made from the debtor's future sources of income, the debtor is able to retain his or her pre-petition assets and avoid liquidation. Upon completion of payments to the debtor's creditors under the plan, the debtor will receive a discharge. *See* 11 U.S.C. §§ 1301-1330 (1988 & Supp. V 1993).

39. Under chapter 7 of the Code, the debtor will receive a discharge of all personal liability for pre-petition indebtedness only after all creditors holding secured claims against the bankruptcy estate have been paid the value of their interest in the property of the estate securing their claims and after creditors with unsecured claims have received payment of their share in any remaining proceeds from the liquidated estate. *See* 11 U.S.C. §§ 725-727 (1988 & Supp. V 1993).

40. This sense of justice is reflected in the legislative history of the Bankruptcy Act:

> It has been said that a bankruptcy law would be unjust to debtors; this is denied. It has been said that a bankruptcy law would be unjust to creditors; this statement is equally unsound. Debtors are now liable to their creditors for the amounts due. They would not be liable to them on any other ground under a bankruptcy law. Creditors now

Modern bankruptcy law is clearly a wondrous legislative response to the inequities historically suffered by debtors under early bankruptcy law. This "modern" bankruptcy law first began to take form in England and the United States during the latter half of the nineteenth century.[41] The first bankruptcy law enacted in England dates back to 1542.[42] This law and many of the other bankruptcy laws that would follow it lacked compassion for the plight of the bankrupt debtor, as they often included imprisonment as a form of relief for the unpaid creditor, and relegated the debtor to the status of criminal while offering limited, if any, forgiveness of the debtor's unpaid debts.[43]

The provision for a debtor's discharge, albeit limited to the merchant debtor, first appeared in the bankruptcy and insolvency laws of England as early as the eighteenth century, and in the first bankruptcy act of the United States in

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have individual remedies against their debtor. Under the bankruptcy law they would have a collective remedy, but only to the same extent.

Under present laws if a debtor is suspected of being in the throes of financial death the creditor who happens to learn of it rushes in with compulsory process and secures a lien on his estate — a lien as against all of the creditors with equal rights. In this particular case it is very advantageous for the lucky creditors, but laws which serve such a man do not result in the greatest good to the greatest number; the bankruptcy law would secure the rights of all the creditors in every case. Again, under State laws, which is a sharp race of diligence, creditors take chances; they strike early and mercilessly, for fear that some other creditor may get in ahead. With the bankruptcy law proper time can be taken for investigation, as all creditors will know that preferences will be not be sustained, and that equity must be done in the distribution of the assets of the insolvent.

H.R. REP. NO. 65, 55th Cong., 2d Sess. 34 (1897).

41. The bankruptcy laws of England and the United States that provide the foundation from which the current bankruptcy laws of each country are structured were enacted in 1883 in England (46 & 47 Vict., ch. 52 (1883) (Eng.)) and in 1898 in the United States (The Bankruptcy Act of 1898, 30 Stat. 544 (1898)). For descriptions of the evolution of bankruptcy laws in England and the United States see, PETER J. COLEMAN, DEBTORS AND CREDITORS IN AMERICA: INSOLVENCY, IMPRISONMENT FOR DEBT, AND BANKRUPTCY, 1607-1900 (1974); WARREN, *supra* note 37; Vern Countryman, *A History of American Bankruptcy Law*, 81 COM. L.J. 226 (1976); Charles J. Tabb, *The History of Bankruptcy Laws in the United States*, 3 AM. BANKR. INST. L. REV. 5 (1995).

42. 34 & 35 Hen. 8, ch. 4 (1542) (Eng.).

43. For historical discussions of the bankruptcy laws of England, see generally Jay Cohen, *The History of Imprisonment for Debt and Its Relation to the Development of Discharge in Bankruptcy*, L. SCH. REC., Fall 1983, at 1; Countryman, *supra* note 41; Tabb, *supra* note 41.

1800.[44] However, the element of imprisonment as a form of bankruptcy relief for creditors remained present in the bankruptcy laws of England until the mid-nineteenth century,[45] and could be found as a remedy available to creditors in this country into the first half of the nineteenth century.[46] The popularity of imprisonment as an appropriate form of bankruptcy relief is reflected in this popular quote from a mid-seventeenth century English jurist:

> If a man be taken in execution, and lie in prison for debt, neither the plaintiff, at whose suit he is arrested, nor the sheriff who took him, is bound to find him meat, drink, or clothes; but he must live on his own, or on the charity of others; and if no man will relieve him, let him die in the name of God, says the law; and so say I.[47]

The harshness of the early bankruptcy law did not reflect the system of justice that Professor Finnis identified under modern bankruptcy law.[48] In fact, the objectives of modern bankruptcy law and early bankruptcy laws are markedly different.[49] As indicated above, early bankruptcy law placed the

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44. Cohen, *supra* note 43, at 8-10; Countryman, *supra* note 41, at 228.

45. Cohen, *supra* note 43, at 5-6, 10-11.

46. The bankruptcy laws of Colonial America and the United States were influenced primarily from the English system of bankruptcy law. *See generally* COLEMAN, *supra* note 41; Countryman, *supra* note 41; John C. McCoid II, *The Origins of Voluntary Bankruptcy*, 5 BANKR. DEVS. J. 361 (1988); Tabb, *supra* note 41.

47. COLEMAN, *supra* note 41, at 5 (quoting Justice Sir Robert H. Hyde).

48. Professor Finnis provided the following description of modern bankruptcy law:

> Bankruptcy is a legal process whereby someone who is insolvent (i.e. cannot discharge his financial liabilities) is judicially declared bankrupt, whereupon his property vests in a trustee who holds it solely for the purpose of division amongst the bankrupt's creditors. During bankruptcy the opportunities and rights of the bankrupt to engage in business are severely limited. Upon satisfactory division of the property, he may be judicially discharged from bankruptcy, whereupon he is relieved for all further liability in respect of his former debts.

FINNIS, *supra* note 11, at 188.

49. One commentator described the different objectives of modern bankruptcy law and the earliest English statutes governing bankruptcy as follows:

> Although the modern conception of bankruptcy is rateable distribution of the bankrupt's assets among his creditors (resulting in the discharge of the bankrupt's obligation to pay existing debts), the original purpose was simply to facilitate execution against a debtor. The bankruptcy act of 1542 authorized the Chancellor and other bankruptcy commissioners, on petition of the creditor, to summon the bankrupt before them, examine the bankrupt upon his oath, and if necessary imprison him until he forfeited his possessions. The bankrupt's estate was dis-

condition of bankruptcy in the category of a penal offense,[50] making the imprisonment of bankrupt debtors one form of relief available to the unpaid creditor. That is, if a debtor was in default on an obligation, the creditor could have him imprisoned until that creditor's debt was paid. In Professor Finnis' view:

> The old provisions were unsatisfactory. For they imposed a condition of servitude upon one who might be innocent of any contempt of law or justice. And, by allowing the debtor to be removed, by one of his creditors, into prison where (unlike a free man or even a slave) he could do nothing to improve his financial position or work off his debts, the old provisions tended to frustrate the commutatively just claims of his other creditors.[51]

The disfavor and elimination of imprisonment as a form of relief for indebtedness, in England and America, took time and was brought about by many factors. The humanitarian voices calling for prison reform in England during the latter part of the eighteenth century had a great impact on the elimination of imprisonment of debtors as the horrific and abusive conditions of the prison system were exposed.[52] Moreover, the political and social theories of the philosophers of the time, including Jean Rousseau, Thomas Jefferson, Jeremy Bentham and Andrew Jackson, had tremendous influ-

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tributed by the Chancellor; however, distribution did not discharge the bankrupt's liability for claims that were not fully paid.

Cohen, *supra* note 43, at 5-6 (footnotes omitted).

50. The nature of the penal offense originated with Henry VIII:

> The statutes passed by Henry VIII in 1542, which established the principles of later bankruptcy law, were penal laws aimed solely at fraudulent traders. These early bankrupts were treated as criminal offenders, and commissioners were given the power to summon them for examination, to confiscate their property, and to punish fraud. There was no consideration given to relieving the bankrupt from his distress; the purpose of the law was to take control of the property of the bankrupt on behalf of the creditors, and the bankrupt remained forever liable for his debts. For almost two hundred years these harsh laws remained in effect, and were strengthened by additional statutes, such as those passed under James I, which condemned those bankrupts who lied under oath, or concealed property, to be pilloried and to have an ear chopped off.

BARBARA WEISS, THE HELL OF THE ENGLISH: BANKRUPTCY AND THE VICTORIAN NOVEL 35 (1986) (footnotes omitted).

51. FINNIS, *supra* note 11, at 188.

52. *See* IAN P. H. DUFFY, BANKRUPTCY AND INSOLVENCY IN LONDON DURING THE INDUSTRIAL REVOLUTION 65-68 (1985).

ences on reforming the bankruptcy and insolvency laws in England and America.[53] One commentator summarized the various influences as follows:

> New world nationalism fed the effort to cut the ties to the Anglo-Saxon legal heritage, especially in the common law, and strengthened the attack on imprisonment for debt by branding it as an Old World anachronism which had no place in a republican society of virtuous, free men. The Enlightenment and the French Revolution reinforced the natural rights concept that men could not contract away their liberty and encouraged legal simplification so as to make law understandable to the common man. Benthamism encouraged Americans to question the practicality of traditional creditor rights, especially the power to imprison broken debtors.[54]

In addition to imprisonment being viewed as an inhumane remedy, it proved to be ineffective and costly for the general community.[55] In most cases, imprisonment did not yield a repayment of debt since it deprived the debtor of the opportunity to earn income to repay the indebtedness; it even added to the debtor's liability because the cost of the imprisonment was typically assessed against the debtor.[56] Moreover, the loss of the debtor as a productive contributor to the economy as a laborer and the loss of financial support for the debtor's dependents, making them wards of the state, were costly aspects of the debtor's imprisonment.[57] As new methods of secured financing became available to secure debt obligations, and laws were created to improve the property attachment and debt collection procedures for creditors, the remedy of imprisonment became obsolete.[58]

While the reform of early bankruptcy law was slow, it is important to note that the process came to fruition in England and the United States in the late 1800s, near the end of the first Industrial Revolution. This reform of bankruptcy law shares a direct correlation with the Industrial Revolution. As one commentator noted, "the expansion of business activity in the late eighteenth century was accompanied by a

53. COLEMAN, *supra* note 41, at 257-58.
54. *Id.*
55. *See id.* at 249-69.
56. *Id.*
57. *Id.*
58. *Id.*

disproportionate increase in the risks which it involved."[59] For the working classes in particular, the low wages and irregular employment commonly experienced during this time "were responsible for the constant indebtedness of the lower classes and their susceptibility to imprisonment for debt."[60] As noted above, the Industrial Revolution not only brought forth dramatic improvements and efficiencies for industry, it also resulted in devastating working and living conditions for the working classes. These inequities prompted impassioned demands for labor and social reform from secular voices, as well as nonsecular voices like that of Pope Leo in his inspirational *Rerum Novarum*.[61]

The modern bankruptcy laws limited the injustices of the old bankruptcy laws in several ways. The most important improvement was the elimination of imprisonment as a form of relief for the creditors of a bankrupt debtor. Another improvement found in modern bankruptcy law was the debtor's ability to receive a discharge of personal liability from pre-bankruptcy debts, giving the debtor a second chance, or what is commonly referred to as a "fresh start."[62] An improvement that is equally important from the perspective of the creditors is that the debtor's pre-petition property vests in the trustee for equitable distribution among all of the debtor's creditors.[63]

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59. DUFFY, *supra* note 52, at 2.

60. *Id.*

61. As noted earlier, Pope Leo XIII issued the *Rerum Novarum* in 1891 during the latter years of the first Industrial Revolution. *See supra* notes 21-23 and accompanying text.

62. As stated in the legislative history of the Code, the debtor's ability to receive a general discharge for all pre-petition indebtedness is "the heart of the fresh start" under bankruptcy law. H.R. REP. No. 595, 95th Cong., 1st Sess. 1 (1977), *reprinted in* COLLIER ON BANKRUPTCY app. 2 (Lawrence P. King ed., 15th ed. 1994); *see also supra* note 38.

63. *See supra* note 38. Professor Finnis noted that modern bankruptcy law permits all creditors to participate in the bankruptcy proceeding and recognizes the priorities creditors enjoy under nonapplicable bankruptcy law as well as bankruptcy law, which reflects commutative and distributive justice under the law. Specifically, he noted that

> bankruptcy law both gives effect to the commutatively just claims of the insolvent's creditors and at the same time subjects all those claims to a principle of distributive justice. Without a law of bankruptcy, and indeed before the provisions of such law are applied to a particular debtor, each of his creditors is entitled to satisfy the whole of his claim from the whole of the debtor's property, regardless of the claims of any other creditor. Bankruptcy law pools all the claims, and treats the

What modern bankruptcy law now reflects is justice for the common good. It considers the well-being of all members of society regardless of their economic circumstances,[64] and follows Saint Thomas' extension of mercy and charity to all.[65] These improvements in bankruptcy law can also be understood as an expression of distributive justice as framed by Saint Thomas, and the distribution of wealth between the haves and have-nots suggested by Pope Leo.[66] We will see from the following discussion that by asking for adjustments from creditors, the various rules of modern bankruptcy law require creditors to *sacrifice* part of their claims to the deserving debtor through the debtor's discharge and to other creditors through a ratable distribution of assets between similarly situated creditors. Such sacrifice reflects contribution by a debtor's creditors to a distributively just society.

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debtor's property as if it were now the common property of the creditors (put technically, the legal ownership vests in the trustee in bankruptcy but the beneficial interest vests in the creditors in common, subject to a division according to law by the trustee).

FINNIS, *supra* note 11, at 188-89.

The commutatively just result under bankruptcy law that permits all creditors to share in the bankruptcy estate is contrary to the remedy a creditor may receive outside of bankruptcy, where the most efficient creditor will attempt to foreclose against the assets of the defaulting debtor before the debtor's other creditors. Such swift action on the part of such a creditor is likely to exhaust all of the debtor's property to the extent that other creditors will not be able to receive any payment due on their debts.

Some of the early bankruptcy or insolvency laws did not reflect commutative justice because they did not include all creditors in the distribution of proceeds from the estate. For example, under English law and some colonial laws, the remedy of imprisonment often had the effect of permitting the creditor who sought a mesne proceeding against the debtor to have the debtor imprisoned until full payment of the debt was made, which in most cases exasperated the debtor's financial condition and left no assets to pay the claims of the debtor's other creditors. *See* COLEMAN, *supra* note 41, at 6-15; DUFFY, supra note 52, at 96-105.

64. *See supra* note 40 and accompanying text.

65. In a comparative study of bankruptcy and insolvency laws in European countries written in 1893, S. Whitney Dunscomb, Jr. described the debtor's ability to receive a discharge under English bankruptcy law, which then was unique to English law, as evidence that "the English legislature ha[d] bowed in recognition to a higher law and ha[d] let 'mercy season justice.'" 2 S. WHITNEY DUNSCOMB, JR., BANKRUPTCY: A STUDY IN COMPARATIVE LEGISLATION 94 (AMS Press, Inc. 1969) (1893).

66. *See supra* notes 31-33 and accompanying text.

B. *Bankruptcy Law and the Aristotelian Notion of Justice*

In Professor Finnis' illustration of modern bankruptcy law as an example of justice, he identified specific rules that demonstrate how bankruptcy is concerned with general justice, as well as how these rules reflect both distributive and commutative justice.[67] Professor Finnis based his examples of justice on concepts framed by Aristotle and other philosophers.[68]

In brief, Professor Finnis noted that general justice is whatever is best for the community.[69] Included in the concept of general justice is distributive justice,[70] which typically anticipates distribution of limited resources between individuals based on "what is due to a person in the circumstances in which he is."[71] Limited resources include such things as the assets of the bankruptcy estate. The great challenge in achieving distributive justice is determining "to whom and on what conditions to make [the] necessary appropriation" of the distribution of assets.[72] On the subject of commutative justice, Professor Finnis underscored that with this type of justice, one is concerned with correcting or rectifying "inequalities which arise in dealings . . . between individuals."[73] Commutative justice, therefore, demands that individuals have respect for the rights of others in their dealings with each other, and is designed to rectify any inequalities, such as "abuses, exploit[ation], or 'free-rides' " by the debtor in his or her relationships with others.[74] In any case, the application of both types of particular justice must be done for the common good of the community.

As noted above, modern bankruptcy law provides that all creditors of the bankrupt debtor may file proof of claims against the bankruptcy estate and share in the proceeds resulting from the liquidation of the bankruptcy estate accord-

67. FINNIS, *supra* note 11, at 188-93. Although the rules of bankruptcy law discussed by Professor Finnis are based on English law, identical rules of law are found under the Bankruptcy Code.

68. *Id.* at 164-84.

69. *Id.* at 164-65.

70. *Id.* at 166-73.

71. *Id.* at 170.

72. *Id.* at 167.

73. *Id.* at 178.

74. *Id.* at 184.

ing to the rules of asset distribution under the Code.[75] This opportunity for equitable participation for all creditors of the bankrupt debtor is unlike nonbankruptcy creditor remedies, which permit the quickest creditor to attach and liquidate all of the available assets of a defaulting debtor to pay his or her particular obligation, with little regard for the claims of other creditors of the debtor. This is an example of commutative justice in bankruptcy law in that *all* creditors who have provided some form of financing or credit to the debtor, or who have other types of monetary claims against the debtor, may have their claims addressed in the bankruptcy proceedings.

Equitable participation is accomplished when each creditor with a valid claim against the debtor participates in the bankruptcy proceeding and enjoys an opportunity to share in the proceeds available for the payment of creditor claims. This right of all creditors to participate in the bankruptcy proceeding is protected under the Code through the requirement that the debtor making a petition for bankruptcy relief file schedules listing all creditors with claims against the debtor at the time of the petition.[76] These creditors then will receive notice of the bankruptcy petition and of their right to file a proof of claim against the bankruptcy estate.[77] The debtor's failure to include a creditor in the schedule may result in the debtor not receiving a discharge of the debt owed to the unlisted creditor.[78]

The bankruptcy rules governing the distribution of proceeds received from the liquidation of the bankruptcy estate recognize the rules of priority between creditors as provided for under nonbankruptcy law, as well as special priority rules of distribution provided under the Bankruptcy Code. These rules, according to Professor Finnis, can also be analyzed in relation to concepts of general justice, reflecting a delicate

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75. 11 U.S.C. §§ 501(a), 725, 726 (1988 & Supp. V 1993).

76. In all petitions for relief under the Code, whether the petition is for chapter 7, 11, 12 or 13, debtors are required to file a list of creditors under § 521. *Id.* § 521.

77. *Id.* § 501.

78. Section 523(a)(3) of the Code provides that a discharge will not be granted to an individual debtor filing a petition for relief under any of the several chapters of the Code for a debt that was not listed nor scheduled pursuant to § 521 if the creditor was known to the debtor, so as to preclude the creditor from being able to file a timely proof of claim or a timely request for a determination of nondischargeability by the court as required under the Code. *Id.* § 523(a)(3)(A)-(B).

balance between distributive justice and commutative justice — a requirement that is also reflective of Catholic social teaching.[79] For example, creditors whose pre-petition claims are secured by specific assets of the bankruptcy estate are entitled to receive the value of their secured claims from the proceeds of the estate before any monies are distributed to unsecured claimants.[80] This is the Code's recognition of the priority secured creditors have over other creditors of the debtor pursuant to nonbankruptcy law.[81] This rule of asset distribution permits secured creditors to receive what is due to them based on priorities they have over competing creditors. This is an example of distributive justice. That is, the condition upon which to make the "necessary appropriation" in the distribution of the assets is based on the amount of the secured creditors' pre-bankruptcy contributions to the debtor's estate and the rights of priority enjoyed by the secured creditors over other creditors of the debtor under nonbankruptcy law.[82]

It is not until after all the secured claims have been paid from the proceeds of the liquidated estate that any remaining assets will be distributed to unsecured creditors of the debtor.[83] Within the group of unsecured claims, statutory provisions prefer certain unsecured claims over others based on principles of equity and public policy, which require that these preferred claimants receive some share in the proceeds of the estate before all other general unsecured claims are satisfied.[84] A typical unsecured claim receiving priority in an

79. *See supra* notes 31-33 and accompanying text.

80. 11 U.S.C. § 725 (1988 & Supp. V 1993).

81. The types of nonbankruptcy priorities recognized in the distribution of assets include the claims of creditors against a debtor's personal property or real property that have been secured and perfected under Article 9 of the Uniform Commercial Code or local real estate law, respectively; judgment liens granted by a court of law pursuant to secure a default judgment against a debtor; and liens that are imposed against a debtor's property by virtue of a statute to secure claims against the debtor on behalf of a protected creditor, except where the lien secures a fine or penalty or is a tax lien as provided under section 724 of the Code. *Id.* § 724.

82. See *supra* notes 67-73 and accompanying text for a brief discussion of Professor Finnis' notion of "justice."

83. 11 U.S.C. § 725 (1988 & Supp. V 1993).

84. The first group of unsecured claims to be paid after the payment of secured claims, if there are proceeds remaining, are listed under § 507 of the Code. These claims are known as "priority claims" and must be paid according to the order in which they are listed. *Id.* §§ 507, 726(a)(1).

individual bankruptcy case might include the unpaid wage claims of employees of the debtor,[85] outstanding child support or alimony payments,[86] or outstanding tax claims due a government taxing authority.[87]

This enjoyment of special priorities among unsecured creditors in the distribution of proceeds is illustrative of the balance between distributive and commutative justice which is sought to achieve general justice. Equitable and public policy considerations require that certain unsecured claimants be paid *before* other unsecured claimants in order to serve the best interests of society. One such example is found in the priority enjoyed by an employee's unpaid wage claim against a bankrupt debtor. Because the bankrupt debtor is most likely the only source of income for the employee, he or she is given priority over the other general unsecured creditors of the debtor.[88] Conversely, other unsecured creditors, such as lenders or trade creditors, have many other sources of income and their economic survival is not "wholly dependent on the debtor," as would be the case for an employee.[89] Other examples of the interplay between the greater objective of achieving the common good of society and the need to allow each claimant to share in the distribution of assets are the special priorities accorded for alimony and child support claims and governmental tax claims.[90]

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85. *Id.* § 507(a)(3).

86. *Id.* § 507(a)(7).

87. *Id.* § 507(a)(8).

88. *Id.* § 507(a)(3). This special priority rule was included under the Bankruptcy Act, the predecessor of the Bankruptcy Code. Congress stated when enacting the Bankruptcy Act that "[t]he debts to have priority . . . and to be paid in full out of bankrupt estates, and the order of payment, shall be . . . wages due to workmen, clerks, or servants which have been earned within three months before the date of the commencement of proceedings." H.R. REP. NO. 65, *supra* note 40, at 22.

An identical rule of bankruptcy law is found under modern English bankruptcy law:

> The law recognizes the similar *need* of those who were presumably wholly dependent on the debtor for their livelihood; high in the list of preferential claims, which must be satisfied in full before further division of the pooled assets, are the wages or salaries of the debtor's "clerks or servants, labourers or workmen," earned during the four months before bankruptcy.

FINNIS, *supra* note 11, at 189.

89. FINNIS, *supra* note 11, at 189.

90. *Id.* at 189-90.

Another example of general justice identified by Professor Finnis is the limit on the debtor's ability to receive a discharge of indebtedness when the debtor has come into bankruptcy with clean hands and is deserving of relief.[91] As Professor Finnis noted, "the law of bankruptcy itself can be made the instrument of injustice, above all by the bankrupt himself. . . . No system of law can secure justice if its subjects, let alone its officials, are themselves careless of justice."[92] Accordingly, to receive a bankruptcy discharge: (1) the debtor must not attempt to hide or conceal assets from the bankruptcy estate;[93] (2) the debtor's financial records must be complete so that his or her financial condition can be ascertained by all interested parties;[94] (3) the debtor must file a petition that is truthful in describing the debtor's financial affairs;[95] (4) the debtor must be able to explain adequately the loss of assets held by the debtor immediately before bankruptcy;[96] and (5) the debtor may not refuse to testify in a bankruptcy court proceeding after having been granted immunity or improperly invoke the privilege against self-incrimination.[97] Under these rules, bankruptcy law provides a remedy against the debtor who has attempted to "abuse" or "exploit" the bankruptcy process at the expense of his creditors by denying the debtor a discharge.[98] This reflects commutative justice and its concern with correcting or rectifying wrongs committed in dealings between individuals.[99]

Even in cases in which the debtor will receive a general discharge from his debts, certain types of debts will not be

91. Under § 727(a) of the Bankruptcy Code, the debtor's right to a discharge is conditioned upon the debtor not having been found to be in violation of the enumerated misconduct listed thereunder. 11 U.S.C. § 727(a)(1)-(6) (1988 & Supp. V 1993). Although the history of discharge under bankruptcy law emphasizes that the discharge of the debtor was a secondary goal under bankruptcy law and the equitable distribution of assets among the debtor's creditors was the primary purpose of the law, the debtor's ability to receive a discharge enjoys equal importance. For a historical discussion of the role of discharge in bankruptcy legislation, see 1A COLLIER ON BANKRUPTCY ¶ 14.01[6] (James W. Moore ed., 14th ed. 1978).

92. FINNIS, *supra* note 11, at 191.

93. 11 U.S.C. § 727(a)(2) (1988 & Supp. V 1993).

94. *Id.* § 727(a)(3).

95. *Id.* § 727(a)(4).

96. *Id.* § 727(a)(5).

97. *Id.* § 727(a)(6).

98. *See supra* notes 67-74 and accompanying text.

99. *See supra* notes 67-74 and accompanying text.

discharged under any circumstances.[100] The rules governing nondischargeable debts reflect an application of commutative justice because the more compelling interests of individual creditors holding qualifying claims against the debtor override the debtor's need for a discharge from the debt. These types of debt include liabilities the debtor has incurred through wrongful conduct, or the discharge of a particular debt which would impose an undue burden upon a particularly deserving claimant or society as a whole. They also include claims based on unpaid tax liabilities;[101] claims the debtor inexcusably fails to list in the bankruptcy petition, thus preventing the claimant from filing a proof of claim to participate in the distribution of proceeds with other creditors;[102] claims arising from an outstanding alimony or child support obligation;[103] claims against the debtor based on injuries the debtor has inflicted upon another due to the debtor's "willful and malicious" conduct;[104] unpaid guaranteed student loans;[105] and claims the debtor has incurred for injuries inflicted upon another in the unlawful operation of a motor vehicle while intoxicated.[106]

Each of the illustrations governing asset distribution between creditors and the debtor's limited right to a discharge of indebtedness demonstrate that bankruptcy law reflects the Aristotelian concepts of justice. The rules of bankruptcy law seek to achieve justice for the common good of society through a balancing of the interests and rights of all individuals affected by the bankruptcy of a debtor in a distributively and commutatively just way. The fact that modern bankruptcy law can be analyzed in the formal terms of justice used by Aristotle, however, should not serve as a distraction from the possibility that some of the rules of modern bankruptcy law may be defective in terms of achieving notions of social justice that have evolved from Catholic social teachings.

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100. 11 U.S.C. § 727(b) (1988 & Supp. V 1993). These debts include those listed under section 523(a) of the Code. *See infra* notes 101-06 and accompanying text.

101. 11 U.S.C. § 523(a)(1) (1988 & Supp. V 1993).

102. *Id.* § 523(a)(3).

103. *Id.* § 523(a)(5).

104. *Id.* § 523(a)(6).

105. *Id.* § 523(a)(8).

106. *Id.* § 523(a)(9).

C. *Bankruptcy Law and Catholic Social Thought*

According to Catholic social justice, the state must enact laws that reflect the common good of society as a whole, meaning it must avoid enacting laws that unjustly favor the interest of one group of society to the detriment of others.[107] Thus, when enacting bankruptcy legislation, Congress must be mindful of the general welfare of the community of individuals that will be affected by bankruptcy laws. This community of individuals includes the debtor seeking bankruptcy relief and the opportunity for a fresh start, as well as all of the creditors of the debtor who hope to receive some payment on their outstanding claims. Such creditors include secured and unsecured creditors; creditors who have made financial contributions, such as loans or credit extensions, to a once financially viable debtor; and creditors who have monetary claims against the debtor based on certain legal rights, such as tax claims, alimony and child support obligations, or claims for outstanding legal judgments against the debtor.

As Pope Leo indicated in *Rerum Novarum*, when implementing and creating laws, the state must be mindful that "the interests of all are equal whether high or low . . . [and] [i]t would be irrational to neglect one portion of the citizens and to favor another."[108] Pope Pius echoed this message, noting that there must be a distribution of wealth among all of the "individuals and classes of society" in order to achieve common good for all and social justice.[109]

Accordingly, such laws must balance the interest of all groups affected by the debtor's bankruptcy. The interest of the deserving debtor in getting a "fresh start" and to be relieved of the financial burdens that led to the debtor's bankruptcy must be justly balanced against the interest of all creditors to share in whatever proceeds will result from the liquidation of the bankruptcy estate. In fact, when one looks more closely at certain bankruptcy rules governing asset distribution and the nondischargeability of debts, there is room for argument that some of these provisions are lacking when measured against Catholic social justice, which calls for the state to enact laws for the common good of society as a whole

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107. *See supra* notes 31-33 and accompanying text.

108. POPE LEO XIII, *supra* note 15, at 26-27.

109. POPE PIUS XI, *supra* note 21, at 55, paras. 57, 58; *see supra* note 34.

and to avoid the enactment of laws that prefer one interest group to the detriment of others.

For example, one of the most effective interest groups in influencing bankruptcy legislation has been the United States Government. The United States Government has been successful in lobbying for the enactment of provisions that not only prohibit the discharge of outstanding tax claims against bankrupt debtors,[110] but also acquiring a priority status in the distribution of proceeds for certain unsecured tax claims.[111] Some commentators have argued that such treatment of unpaid tax obligations is warranted in the interest of the public welfare to require all citizens to contribute to the community by paying their share of the tax burden and not permitting debtors to escape such liability by going into bankruptcy.[112] It is questionable, however, whether permitting

110. Tax liabilities of the debtor that are nondischargeable include tax obligations: (1) that enjoy priority status under § 507(a)(8) of the Code; (2) for which the debtor was required to file a tax return but failed to file; (3) for which the debtor was found to have filed a fraudulent return or to have willfully attempted to evade or defeat such tax liability; and (4) that were filed late, yet filed within two years of the filing of the bankruptcy petition. 11 U.S.C. § 523(a)(1) (1988 & Supp. V 1993).

The special status granted to tax liability under bankruptcy laws also is illustrated in the Bankruptcy Reform Act of 1994. Pursuant to the Act, Congress recently amended the Code so that outstanding loans obtained from third-party lenders to pay tax obligations owed to the United States Government now qualify as nondischargeable debts for the benefit of the third-party lender. Pub. L. No. 103-394, 108 Stat. 4106 (1994) (codified as amended at 11 U.S.C. § 523). The effect of this amendment enhances a debtor's ability to pay their federal taxes with credit cards. This also benefits the United States Government by making such financing to taxpayers more palatable from the perspective of credit card issuers. *See* 140 CONG. REC. H10,769 (Oct. 4, 1994).

111. The tax obligations that are both nondischargeable and enjoy priority status are the unsecured tax obligations described under § 507(a)(8) of the Code. For the most part they include recent tax liabilities including: income tax liabilities for which a return was due any time after three years before the date of the filing of the bankruptcy petition; income taxes assessed within 240 days of the filing of the petition; property taxes assessed before the petition and last due without penalty within one year of the filing of the petition; the trust fund taxes an employer is required to collect or withhold from employees for social security or income taxes; and excise taxes, such as sales taxes, due on transactions occurring within three years prior to the date of the filing of the petition. 11 U.S.C. § 507(a)(8) (1988 & Supp. V 1993).

112. The House Report to the Bankruptcy Reform Act of 1978 discussing the priority and nondischargeability of tax obligations explained that "[a]n open-ended dischargeability policy would provide an opportunity for tax evasion through bankruptcy, by permitting discharge of tax debts before a taxing authority has an opportunity to collect any taxes due." The House Report further noted that "[t]he priority is tied to this nondischargeability provision, in order

the taxing authority to have the benefit of both a nondischargeable debt as well as priority status in the distribution of proceeds over other unsecured claims is for the common good of all individuals affected by the debtor's bankruptcy.[113]

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to aid the debtor's fresh start. By granting the nondischargeable tax a priority, more of it will be paid in the bankruptcy case, leaving less of a debt for the debtor after the case." H.R. REP. NO. 595, *supra* note 62, at 190.

113. Prior to 1966, all taxes that were due a government were subject to priority status and deemed nondischargeable under bankruptcy law. With the 1966 amendments to the Bankruptcy Act, Congress changed the law so that only nondischargeable tax claims becoming due within three years of the filing of the petition for bankruptcy relief received priority status. The Commission on Bankruptcy Laws recommended these limitations. As expected, the Department of the Treasury "resisted" them. The Commission was concerned, however, about justifying the special priority for tax claims and reflected this concern in its report to Congress in 1973. The Report stated that "the Congressional policy decision that the recognition of priority for an accumulation of 'stale' taxes is unfair to general creditors." REPORT OF THE COMM. ON THE BANKRUPTCY LAWS OF THE UNITED STATES, H.R. DOC. NO. 137, 93d Cong., 1st Sess. 215-17 (1973), *reprinted in* COLLIER ON BANKRUPTCY app. 2, at pt. 1 (Lawrence P. King ed., 15th ed. 1994).

Moreover, Congress recognized that a rule permitting all outstanding tax debts to be nondischargeable, without any limit as to the age of such debt, could hinder the debtor's ability to receive a fresh start. The 1966 House Report explains:

> Frequently, [nondischargeability of taxes] prevents an honest but financially unfortunate debtor from making a fresh start unburdened by what may be an overwhelming liability for accumulated taxes. The large proportion of individual and commercial income now consumed by various taxes makes the problem especially acute. Furthermore, the nondischargeability feature of the law operates in a manner which is unfairly discriminatory against the private individual or the unincorporated small businessman. Although a corporate bankrupt is theoretically not discharged, the corporation normally ceases to exist upon bankruptcy and unsatisfied tax claims, as well as all other unsatisfied claims, are without further recourse even though the enterprise may continue in a new corporate form.
>
> The committee believes, therefore, that consistency with the rehabilitory purpose of the Bankruptcy Act, as well as fairness to individuals demands some time limit upon the extent of taxes excepted from discharge.

COLLIER ON BANKRUPTCY app. 1, at 1579 (James W. Moore ed., 14th ed. 1978) (alteration in original) (quoting H.R. REP. NO. 687, 89th Cong., 1st Sess. (1966)); *see also id.* ¶ 17.01[3.2]; 3 COLLIER ON BANKRUPTCY ¶ 507.01 (Lawrence P. King ed., 15th ed. 1994).

Professor Finnis also noted the question concerning the reasonableness of the bankruptcy rules governing outstanding tax liabilities and how they best serve the Aristotelian rules of justice: "[T]he English law of bankruptcy applies principles of justice in ways which are reasonable but not necessarily or always the only reasonable, or even most reasonable, amongst possible ways. Doubts have reasonably, if not compellingly, been raised about, for example, the priority accorded to claims to unpaid taxes . . . ." FINNIS, *supra* note 11, at 190.

By making the tax obligation nondischargeable, bankruptcy law achieves the objective of making all debtors accountable to the community pay a share of the tax burden. The shared tax burden finances the services that all members of the community enjoy. All must contribute to the support of these services if the government is to be able to respond to and promote social welfare. This reflects the notion of justice that the law should serve the common good of society as a whole. It also reflects a balancing of the interest of the individual debtor seeking discharge and what is in the best interest of the community.

It is clear that the nondischargeability of such a debt is a hardship for the debtor, in that the debtor will remain personally liable to the government on the tax obligation after the bankruptcy case is closed. In effect, this will reduce the benefits of the "fresh start" the debtor hoped to obtain by seeking bankruptcy relief. Congress reasoned, however, that the priority status enjoyed by such nondischargeable tax obligations lessens the burden of distribution, because such debts are paid before general unsecured debts are paid.[114]

Yet, when one is reminded that general unsecured creditors also are affected by the debtor's bankruptcy, the special priority enjoyed by tax obligations over other general unsecured claims in the distribution of assets does not seem as justified. This is particularly poignant given the fact that tax obligations also enjoy a nondischargeable status. As noted above, one of the fundamental objectives of modern bankruptcy law is to permit all creditors to share in the proceeds of the bankruptcy estate. This goal will have little chance of success when outstanding tax claims are paid before other general unsecured claims. That is, if the tax claims exceed the amount of proceeds from the bankruptcy estate liquidation, then no proceeds will be available for distribution to the remaining unsecured claims.

The arguments made to justify giving the tax claimant this priority over other unsecured claims are not as compelling as the arguments made for the distribution priorities enjoyed by alimony and child support claims, or wage claims of the bankrupt debtor's employees. In these cases, the claimants are affected more directly by the debtor's bankruptcy be-

114. *See supra* note 112.

cause the debtor is the major, if not the only source of their income. These claimants are some of the most vulnerable unsecured creditors of the bankrupt debtor. Unquestionably, they deserve a priority over other general unsecured creditors who are less dependent on payments from one particular debtor, as in the case of a government tax authority. Moreover, the fact that the tax obligation is nondischargeable makes the priority status in distribution of proceeds less compelling and more evident of overreaching by the government taxing authorities. One might argue that it is an unjustifiably preferential rule of law.

The United States Government is only one of several interest groups who have appealed to Congress for provisions that preserve or prefer their claims over other claims in bankruptcy.[115] Regardless of the interest groups petitioning Congress for some provision in their favor, it is the duty of the state, as defined by Catholic social thought, to provide society with just laws that do not unfairly prefer one group over another. Such a concept of justice is important for all legislative bodies to remember when considering proposed legislation and how that legislation will best serve the communities governed by its laws.

115. One group that has appeared before Congress to lobby for the nondischargeability of liabilities incurred by a debtor as a result of the debtor's unlawful operation of a motor vehicle while legally intoxicated was Mother's Against Drunk Driving (MADD). *See Dischargeability in Bankruptcy of Criminal Fines, Restitution, and Related Liabilities Arising Out of a Debtor's Operation of a Motor Vehicle While Legally Intoxicated: Hearings Before the Subcomm. on Economic and Commercial Law of the House Comm. on the Judiciary*, 101st Cong., 2d Sess. 6 (1990) (statement of Janice Lord, National Director, Victim Services, Mothers Against Drunk Driving).

Interest groups that have lobbied for the nondischargeability of consumer credit card indebtedness include the American Bankers Association, the Consumer Bankers Association and the American Retail Federation. These groups were very interested in the enactment of § 523(a)(2)(C) of the Code, which creates a rebuttable presumption against the discharge of certain debts or cash obtained by a debtor with a credit card immediately prior to filing a petition in bankruptcy. *See Oversight Hearings on Personal Bankruptcy: Hearings Before the Subcomm. on Monopolies and Commercial Law of the House Comm. on the Judiciary*, 97th Cong., 1st & 2d Sess. 812-26 (1981-1982) (statements of A. Thomas Small, American Bankers Association and the Consumer Bankers Association and Robert D. Ranck, the American Retail Federation).

IV. CONCLUSION

Every law serves a specific purpose. Bankruptcy law is designed to provide financial relief to the overburdened debtor and to assure that all creditors with claims against the debtor have an opportunity to receive their due share from the bankruptcy estate. The greater purpose of all laws, however, must be to serve the common good of all. To the extent that bankruptcy law addresses competing claims against an estate that is insufficient to satisfy all claims, the competing interests must always be balanced against the common good of society as a whole. This often will require sacrifice or contribution from one for the benefit of another; it will undoubtedly require mercy and liberality. As we learn from the teachings of Saint Thomas, justice at its highest level will not be achieved without these virtues.

Saint Thomas' theory of justice made the moral virtue of the individual central in achieving social justice. The pontiffs also emphasized this point.[116] For any legislative body to carry out this notion of social justice, it is imperative that the individual members who make up these legislative bodies possess a character that recognizes and embraces the greater importance of the individual's responsibility in achieving social justice. By embracing this responsibility for the attainment of social justice, one can expect that the laws enacted by these individuals will be similarly inspired by such justice. This will require that these individuals be merciful and charitable to others. They must be willing to forego their own self-interest for the common good of society, and never permit the interest of any one group to violate justice for the rest of society. All men and women, citizens and lawmakers alike, can be inspired to remember and practice these higher notions of justice by simply recalling the wise and poetic words spoken by Portia, the lawyer in William Shakespeare's *The Merchant of Venice*: "Earthly power doth show likest God's when mercy seasons justice."[117]

116. *See supra* part II.
117. *See* SHAKESPEARE, *supra* note 1.